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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MAGPIONG,

Defendant and Appellant.

D041968

(Super. Ct. No. SCS167304)

APPEAL from a judgment of the Superior Court of San Diego County, Terry Scott, Judge. Affirmed.

The jury convicted appellant David Magpiong of numerous offenses and found true numerous enhancements in connection with his assault on and robbery of Armando Arana-Acosta (Arana).¹ Magpiong argues there were instructional and trial errors

¹ The jury convicted Magpiong of kidnapping (Pen. Code, § 207, subd. (a)), robbery (§ 211), assault with a deadly weapon (§ 245, subd. (a)(1)), criminal threat (§ 422), possession of a firearm (§ 12021, subd. (a)(1)), and escape from arrest (§ 836.6, subd. (b)). It found true the enhancing allegations that he personally used a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b), 1192.7, subd. (c)(8)) as to the kidnapping,

warranting reversal, and the trial court abused its discretion by denying his motion for mistrial.

I

FACTUAL BACKGROUND

On the evening of March 22, 2002, Arana cashed his paycheck and went to a barbershop in National City for a haircut; Magpiong was the barber. When the haircut was finished, Arana took a \$50 bill from his wallet and gave it to Magpiong to pay for the haircut. Instead of giving the change to Arana, Magpiong struck him in the head with a sawed-off shotgun, causing Arana to bleed profusely. Magpiong also threatened Arana with the shotgun, took his money, smashed his finger and kicked him. At gunpoint, Magpiong forced Arana to enter a car parked outside the barbershop. Arana sat in the passenger's seat and Magpiong sat behind Arana in the rear seat holding the gun to Arana's neck; an accomplice drove the car. The accomplice asked Magpiong for directions and where they were going to "dump" Arana. After driving to a location about one mile away, Magpiong ordered Arana to leave the car but chambered a round and told Arana to run for his life. As Arana fled, Magpiong and his accomplice left.

The following day, police examined the barbershop premises and found blood that matched Arana's in several locations. Arana was taken to the barbershop, where he

robbery and assault counts, and the enhancing allegations that he personally inflicted great bodily injury (§§ 12022.7, 1192.7, subd. (c)(8)) as to the robbery and assault counts. In the bench trial of the prior conviction allegations, the court found true that Magpiong had two "prison priors" (§§ 667.5, subd. (b), 668), two "violent prison priors" (§ 667.5, subd. (a)), several "strike" priors (§§ 667, subds. (b)-(i), 1170.12, 668), and several no probation priors (§ 1203, subd. (e)(4)), as alleged in the information. All further statutory references are to the Penal Code unless otherwise specified.

identified Magpiong as his assailant and identified a car parked in front of the shop as the car used to transport him. Magpiong was arrested and placed in the back of a patrol car, where he then used a cellular telephone to call his stepson and instructed him to hide "the gun" (a sawed-off shotgun introduced at trial as exhibit 5) in a shed. Despite subsequent efforts by Magpiong's family to dispose of the shotgun, police ultimately found it; the parties stipulated the gun was illegal.

II

ANALYSIS

A. The Instructional Issue

Arana testified through a court-certified Spanish/English interpreter. Magpiong argues that in every case in which an interpreter is used there exists the possibility that linguistic nuances or the absence of precise correlative words or phrases in the two languages may render the translation imperfect. Accordingly, Magpiong argues a court sua sponte must instruct the jury that translated testimony be viewed with caution whenever a court-certified interpreter is employed.

A court's sua sponte instructional obligation applies only to instructions on general principles of law closely and openly connected to the facts of the case and necessary to the jury's understanding. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) There is no obligation to give instructions, even on request, on matters lacking evidentiary support. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.)

Magpiong cites nothing in the record suggesting the interpreter struggled to match Arana's Spanish responses with correlative English words. Moreover, the core issue was

whether Arana accurately identified his assailant and described the events of March 22, 2002, and Magpiong identifies nothing to suggest this case involved matters in which linguistic nuances and the accompanying dangers of imprecise translation could have been determinative of any issue. Because the cautionary instruction was neither necessary to the jury's understanding of the case nor supported by any evidence, there was no obligation sua sponte to instruct that translated testimony be viewed with caution.

B. The Shackles Issue

Magpiong argues the trial court's order that he wear a restraint during trial was a prejudicial abuse of discretion.

A defendant may be subjected to physical restraints in the courtroom while in the jury's presence only on a showing of a manifest need for restraints. (*People v. Mar* (2002) 28 Cal.4th 1201, 1216.) Although there are no bright line rules for determining manifest necessity, the use of restraints has been upheld for defendants who engage in disruptive or violent behavior in the courtroom (*People v. Medina* (1990) 51 Cal.3d 870, 897-898), escape attempts (*People v. Burnett* (1967) 251 Cal.App.2d 651, 655; *People v. Stabler* (1962) 202 Cal.App.2d 862, 863-864), or other violent or nonconforming behavior (*People v. Sheldon* (1989) 48 Cal.3d 935, 945-946). Moreover, "where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Duran* (1976) 16 Cal.3d 282, 291, fn. omitted.) If the trial court independently determines on the basis of an on-the-record showing of defendant's nonconforming conduct or violent behavior that "there existed a manifest need to place defendant in restraints" (*People v. Hill* (1998) 17 Cal.4th

800, 842), its decision to restrain the defendant will be upheld absent an abuse of discretion. (*People v. Medina* (1995) 11 Cal.4th 694, 731.)

The court independently found on the record that there was a manifest need to restrain Magpiong, albeit using a low level of restraint, because Magpiong had engaged in violent confrontations with other inmates while in custody during the month preceding trial, and had shown a willingness to escape custody. Magpiong contends this evidence does not justify the order. First, he asserts his three violent confrontations with three different inmates while awaiting trial should be disregarded because the record contains no evidence he was the instigator of the violence. However, Magpiong did not assert below that his custodial confrontations were sparked by unsolicited violence from other inmates, and a court could infer (both from the frequency of the events and the fact that Magpiong violently engaged with three *different* inmates) that he was the source of the problem. Second, Magpiong asserts his escape attempt cannot justify placing him under courtroom restraints because it was charged as a misdemeanor, it involved no violence but was instead a mere effort to avoid arrest, and he had made no other attempts to escape. Although Magpiong's level of violence in his escape attempt was *de minimus*, he had already been arrested, handcuffed, and placed in the back of the police car with the doors closed before his escape attempt. However, someone apparently opened the door for him, and despite his restraints he took advantage of that opportunity to escape. Even when the officer again corralled Magpiong and grabbed him from behind, he struggled with sufficient resistance to knock the officer down. A court could infer that Magpiong,

having seized an opportunity to attempt escape despite being handcuffed, posed a danger of a similar effort were he left entirely unrestrained.

However, even assuming the trial court erred, there is no showing of prejudice. Magpiong was restrained by a single chain attached to one of his ankles and secured to an eyebolt in the floor under counsel's table; this area was ordinarily shielded from the jurors' sightlines by a skirt around the table. Moreover, as an additional precaution to mask that Magpiong was restrained, the court directed that all others at the counsel tables remain seated when the jury entered to avoid highlighting Magpiong's inability to stand. Magpiong cites no evidence the jury in fact observed the restraints,² and "we have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) Accordingly, even if it was error to restrain Magpiong, there is no evidence supporting his claim of prejudice.

C. The Mistrial Motion

Background

Magpiong was charged with the offense of being an ex-felon in possession of a firearm (§12021, subd. (a)(1), Count 5), and with a series of special allegations and

² Magpiong speculates it was "impossible" that the jury would not have heard the chain rattle at some point in the proceedings. However, this speculation is not evidence. Moreover, brief glimpses of a defendant in restraints, standing alone, will not warrant reversal. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 584-585; *People v. Duran*, *supra*, 16 Cal.3d 282, 287, fn. 2.)

enhancements because of his prior felony convictions. Through a series of pretrial motions and stipulations, the parties sought to avoid any possible taint on the jury's deliberations arising from Magpiong's prior felony convictions. Among the artifices used in this endeavor was an agreement to instruct the jury to determine Magpiong's guilt or innocence on Count 5 as though Magpiong were charged only with possession of an illegal firearm and, by stipulating the shotgun was illegal, to submit to the jury only the issue of whether Magpiong possessed the firearm.³

Mistrial Motion

Although the court's oral and written instructions on Count 5 referred to the *charge* of possession of an illegal firearm, the verdict form submitted to the jury described the offense charged in Count 5 as "Possession of a Firearm by a Felon." This verdict form, which was the result of oversight and inadvertence by all parties, triggered an immediate response from the jury. Within 15 minutes of the start of deliberations, the jury sent a note inquiring about the disparity, and the court promptly responded that there was an error on the verdict forms and corrected forms would be given to the jury.⁴ The bailiff collected the verdict forms from the jury, brought them to the court, and the parties

³ Additionally, Magpiong had obtained (1) an order bifurcating trial of his prior conviction allegations and (2) an order limiting the prior offenses that could be used to impeach him if he elected to testify.

⁴ Specifically, the jury note stated "The jurors are not aware that [Magpiong] is a felon. In regards to count five, possession of a firearm by a felon, should the jurors take as fact that [Magpiong] is a felon?" The court's response, delivered by the bailiff to the jury 20 minutes later, stated "There is an error on verdict forms. I'll return corrected verdict forms shortly. Continue your deliberations."

discussed the appropriate response to the error. After some discussion, the court ruled that it would return the corrected verdict forms with a note. That note advised the jury:

"I return the proper verdict forms. [¶] Regarding your . . . question, disregard the first submitted verdict forms. Verdict forms are not evidence. They are not instructions on the law. The erroneous verdict form is not to be relied on for any purpose. Treat it as though you had never heard of it. [¶] Confine your deliberations to the evidence submitted to you and the law of this case. Do not allow erroneous forms to distract you from the evidence and those matters which are in question."

Magpiong moved for a mistrial on the ground that inadvertently providing the jury with the knowledge of his ex-felon status precluded him from obtaining a fair hearing. The trial court denied the motion.

Magpiong asserts the trial court abused its discretion by denying his motion for a mistrial because the jury received highly prejudicial evidence. We are satisfied the court's instruction adequately removed any taint⁵ on the jury's deliberations and therefore Magpiong's motion for mistrial was properly denied. The parties agreed to eliminate evidence of Magpiong's prior convictions at trial, and the trial court (in response to the

⁵ Although Magpiong relies on cases holding a trial court has discretion to grant a mistrial when a jury receives highly prejudicial, *inadmissible* evidence (cf. *People v. Williams* (1997) 16 Cal.4th 153, 211), we reject Magpiong's unsupported predicate that evidence of his prior convictions was necessarily inadmissible. Although he correctly notes his decision not to testify eliminated use of his prior felony record for impeachment purposes, and the order bifurcating trial of the special allegations and enhancements made his prior felony record irrelevant as to those allegations, Magpiong is wrong that his status as an ex-felon was irrelevant to Count 5 because he operates under the erroneous impression that he was only charged with possession of an illegal weapon (§ 12020, subd. (a)(1)), which rendered his ex-felon status moot. Contrary to Magpiong's claim, the amended information charged him with the substantive crime of being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)), which would have permitted the prosecution to introduce evidence of Magpiong's prior record.

jury's natural confusion over the disparity between the trial evidence and the verdict form) issued an immediate *mea culpa* that there was "error on [the] verdict forms." After correcting its "error," the trial court instructed the jury (1) to disregard the erroneous forms, (2) verdict forms are not evidence or instructions on the law and are not "to be relied on for any purpose," and (3) to confine their deliberations to the evidence introduced and the instructions given. Because the jury is presumed to follow the instructions given it (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73), including curative instructions (*People v. Osband* (1996) 13 Cal.4th 622, 717), the trial court acted within its discretion to conclude that any harm from the jury's brief exposure to a wrong verdict form did not warrant a mistrial.

Magpiong also argues the prosecutor committed *Griffin* error (*Griffin v. California* (1965) 380 U.S. 609) by commenting on his exercise of the Fifth Amendment privilege against self-incrimination.⁶ "Under the rule in *Griffin*, error is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina, supra*, 11 Cal.4th at p. 755.)⁷ When assessing

⁶ Magpiong's appellate argument is murky. He appears to argue on appeal that, because of the lingering pernicious impact of the *Griffin* error, the verdict form error was magnified and therefore the trial court abused its discretion by denying his mistrial motion. However, counsel did not mention below the alleged *Griffin* error in connection with the mistrial motion. We therefore treat Magpiong's argument on appeal as separately asserting reversal based on *Griffin* error.

⁷ Generally, *Griffin* error is waived absent an objection (*People v. Mincey* (1992) 2 Cal.4th 408, 446) and request for a curative admonition in the trial court. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) The only exception is if timely objection and admonition could not have cured any prejudicial effects of the misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 447.) Although Magpiong objected to the comment,

a claim of *Griffin* error, we view the prosecutor's allegedly offensive comments in the context in which they were made. (*People v. Mayfield* (1993) 5 Cal.4th 142, 178.)

Here, the prosecutor made no direct reference to Magpiong's decision to remain silent and not to testify, and we do not believe the prosecutor's statements, taken in the context of his closing argument, would lead the jury to draw an impermissible inference regarding Magpiong's silence. The prosecutor's closing argument began by highlighting four concepts contained within the instructions that he believed were important to helping the jury assess the evidence. The remarks cited by Magpiong as offending *Griffin* occurred when the prosecutor, addressing the fourth of those concepts, stated:

"Fourth, and the final tool, and the important guiding light, if you will, in sifting through this trial about what has been material and what has been not is an instruction dealing with motive. Motive. Why would someone do this to someone? Why? Wouldn't we like to know? Wouldn't we like to know what could possibly motivate someone to be so cruel, so dark in their souls to do this to another human being? We would like to know, but we can't know. We can't know. [¶] And it's right that we can't know. Because motive is not an element of the crime charged and need not be shown, the law tells us. Why? Why? *Because only he knows why, and only he knows why.* [¶] . . . [¶] And in a system that premises itself on a presumption of innocence, a system that we have in this country that does not allow us to focus on confessions, confessions, confessions, inquisitions--we don't convict people in this country based on a system that's geared toward securing confessions. We convict people . . . by the collection of evidence, independent of the defendants. And that is right. That is what protects their rights. . . . Evidence is what is required to remove the presumption of innocence. [¶] So when the law tells us motive is not an element of the crime, it is telling us that the why this happened need not be proved. What needs to be proved is who did it and what did they do." (Italics added.)

presumably on *Griffin* grounds, he did not request a curative admonition. We need not examine the waiver question because we are convinced no *Griffin* error occurred.

Magpiong asserts the italicized language was an indirect comment on his failure to testify in violation of *Griffin*. However, in context, the prosecutor was merely stating that the jury, although understandably curious about *why* a person would engage in such callous behavior, should not allow that issue to distract them from their task of deciding what occurred and who did it. Moreover, the jury was prophylactically instructed under CALJIC Nos. 2.60 and 2.61 of Magpiong's right to rely on the state of the evidence and not to draw any inference of guilt from his failure to testify. There was no *Griffin* error.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.